

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 98-0410
SALES AND USE TAX
For the Years 1995, 1996, and 1997**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Applicability of Exemption Certificates to Sales Transactions With Two of Taxpayer's Customers.

Authority: IC 6-2.5-8-8; IC 6-2.5-8-8(a); IC 6-2.5-8-8(c).

Taxpayer protests the audit's determination that taxpayer should have collected sales tax on certain transactions made with two of the taxpayer's customers. The taxpayer maintains that because those customers issued blanket sales tax exemption certificates, transactions made with those two customers were not subject to the state's gross retail (sales) tax.

II. Applicability of the Gross Retail Tax on Taxpayer's Purchase of Reporting Services.

Authority: IC 6-8.1-5-1(b); 45 IAC 2.2-4-2; 45 IAC 2.2-4-2(a); 45 IAC 2.2-4-2(a)(1); 45 IAC 2.2-4-2(a)(2).

Taxpayer protests the audit's determination that taxpayer should have paid sales tax on subscriptions to publications which the taxpayer characterizes as "Industry Reporting Services."

III. Imposition of the State Gross Retail Tax on Taxpayer's Purchase of Crane Rental Services.

Authority: IC 6-8.1-5-1(b); 45 IAC 2.2-4-27; 45 IAC 2.2-4-27(d); 45 IAC 2.2-4-27(d)(3)(A); 45 IAC 2.2-4-27(d)(3)(B).

Taxpayer protests the audit's determination that five invoices for crane rental services were subject to the state's gross retail tax.

IV. Imposition of the State Gross Retail Tax on an Invoice for Repair of Equipment.

Authority: IC 6-2.5-2-1(a); IC 6-2.5-2-1(b); IC 6-2.5-4-1(b); 45 IAC 2.2-4-2(a); 45 IAC 2.2-4-2(a)(2); 45 IAC 2.2-4-2(c).

Taxpayer protests the audit's determination that an invoice for the repair of an item of taxpayer's equipment was subject to the state's gross retail tax.

V. Request for Abatement of the Ten-Percent Negligence Penalty.

Authority: IC 6-8.1-10-2.1(a); IC 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).

Taxpayer requests that the Department exercise its discretion to abate the ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a provider of specialized construction and fabrication services. Among other large-scale industrial projects, taxpayer constructs boilers, environmental control equipment, power plant equipment, and the buildings which enclose that equipment. Taxpayer is headquartered in Indiana but performs work for both in-state and out-of-state customers.

DISCUSSION

I. Applicability of Exemption Certificates to Sales Transactions With Two of Taxpayer's Customers.

Taxpayer has on file Indiana General Sales Tax Exemption Certificates for two of its customers. One of the exemption certificates is marked as a "blanket" exemption. The second is not marked as either a "blanket" or "single purchase" exemption but simply states that it is applicable for "various purchases."

The audit determined that the certificates were inapplicable to certain of taxpayer's sales made with two of the issuing customers and that taxpayer should have collected sales tax on those particular transactions. The transactions at issue were those for which the customer issued a purchase order stating that the particular transaction was not exempt from sales tax. The audit determined that the taxability statement on the individual purchase order overrode the blanket exemption certificate.

The taxpayer disagrees with the audit's assessment and argues that the two Indiana General Sales Tax Exemption Certificates were sufficient on their own accord to relieve taxpayer of any and all duty to collect sales tax on all transactions made with the two issuing companies.

IC 6-2.5-8-8 allows certain "persons" to issue exemption certificates. IC 6-2.5-8-8(a) states that, "A person . . . who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax." That same code section describes the responsibility of the person receiving such a certificate stating that, "A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase." Id.

Taxpayer maintains that it is entitled to rely exclusively on the two exemption certificates in determining the applicability or inapplicability of the state's gross retail tax for sales transactions conducted with the two issuing customers. Taxpayer misapprehends the dimensions of the blanket exemption certificate. IC 6-2.5-8-8(a) states that exemption certificates may be issued for "transaction[s] *which [are] exempt* from the state gross retail and use taxes" Id. (Emphasis added). That particular caveat is emphasized again at IC 6-2.5-8-8(c) which states that "[t]he department may also allow a person to issue a blanket exemption certificate to cover *exempt purchases* over a stated period of time." Id. (Emphasis added). An exemption certificate is not a universal declaration of sales tax immunity, globally inclusive for each and every transaction conducted with the issuing party. In the case of the first exemption certificate, customer has clearly indicated that the certificate is applicable to the "[s]ale of manufacturing machinery, tools and equipment to be used directly in direct production." Sales Tax Exemption Certificate, Customer One. In the case of the second exemption certificate, the customer has erroneously indicated that the exemption is applicable "[f]or purchases shipped out of state by vendor." Sales Tax Exemption Certificate, Customer Two.

As set out in IC 6-2.5-8-8(a), taxpayer is entitled to rely on the customers' exemption certificates for those transactions "which [are] exempt from the state gross retail and use taxes" The taxpayer, as the recipient of a blanket exemption certificate, is not expected to determine the validity of each and every purchase order issued by the exemption holder. However, when the issuing customer submits a purchase order clearly stating that the transaction is for a non-exempt purchase, customer is indicating the transaction does not come within the orbit of its exemption certificate. Rather, the customer is indicating – for reasons entirely irrelevant to taxpayer – the transaction is for the sale of tangible personal property properly subject to the state's gross retail tax and that it is taxpayer's responsibility to collect the sales tax on that particular transaction.

FINDING

Taxpayer's protest is respectfully denied.

II. Applicability of the Gross Retail Tax on Taxpayer's Purchase of Reporting Services.

Taxpayer protests the assessment of sales tax on its purchase of two reporting services. The two reporting services provide the taxpayer with up-to-date information allowing taxpayer to assess prospective jobs. Taxpayer maintains that under 45 IAC 2.2-4-2, the reporting services supply a service which does not come within the purview of the state's gross retail tax.

45 IAC 2.2-4-2 contains a provision exempting the purchase of services from sales tax. 45 IAC 2.2-4-2(a) states that, "Professional services, personal services, and services in respect to property not owned by the person rendering such services are 'not transactions of a retail merchant constituting selling at retail,' and are not subject to gross retail tax." However, "[w]here, in conjunction with rendering professional services . . . the serviceman also transfers tangible personal property for a consideration, this *will* constitute a transaction of a retail merchant constituting selling at retail" *Id.* (Emphasis added). This rule governing transactions for services and tangible personal property contains a number of exceptions including one for which "[t]he serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property." 45 IAC 2.2-4-2(a)(1). Another exception is found at 45 IAC 2.2-4-2(a)(2) which excepts from sales tax "tangible personal property purchased [and] used or consumed as a necessary incident to the service." Conceivably, taxpayer's purchase of the reporting services falls within one of the exceptions. However, the audit determined that taxpayer's purchase of the reporting services was simply the purchase of a publication otherwise subject to sales tax. Under IC 6-8.1-5-1(b), audit's determination is presumed correct and "the burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC 6-8.1-5-1(b). Absent any evidence that the purchase of the reporting services falls within one of exceptions, taxpayer has failed to meet its statutorily imposed burden of proof.

FINDING

Taxpayer's protest is respectfully denied.

III. Imposition of the State Gross Retail Tax on Taxpayer's Purchase of Crane Rental Services.

On five occasions, taxpayer rented a crane. Pursuant to its agreement with lessor, the crane rental service also provided taxpayer an operator for that crane. Taxpayer argues that, under the provisions of 45 IAC 2.2-4-27(d)(3)(B), the price of the crane rental and associated operator is not subject to sales tax.

Taxpayer rents cranes for two purposes. The cranes are rented to perform installation of components and building materials which taxpayer's own equipment is unable to accomplish. The cranes are also rented to make "point-to-point" transfer of components and building materials. In a "point-to-point" transfer, the components and materials are not being installed, they are simply being moved from one place at the construction site to another. Taxpayer maintains that while its own employees are involved in performing all of this work, the crane operator – the person most familiar with the operation and capabilities of the equipment – exercises control over the manner in which the work is accomplished. According to taxpayer, the operator has the discretion to refuse to perform that work which the operator believes is unsafe or which exceeds the capabilities of the crane equipment then being used.

45 IAC 2.2-4-27 provides the starting point for determining the taxability of transactions for the rental of tangible personal property. That section states "[i]n general, the gross receipts from renting or leasing tangible personal property are taxable." An exception to that general rule is found at 45 IAC 2.2-4-27(d)(3)(B) which states "[t]he rental of tangible personal property together with an operator as part of a contract to perform a specific job in a manner to be determined by the owner of the property or the operator shall be considered the performance of a service rather than a rental or lease *provided the lessee cannot exercise control over such property and operator.*" (Emphasis added). The exemption is clearly qualified and limited to those transactions in which the lessee (taxpayer) does not exercise control over the manner in which the crane operator conducts the work. Taxpayer argues that its rental transactions fall within the exemption.

45 IAC 2.2-4-27(d)(3)(A) provides the flip side of the exemption, stating that, "[t]he renting or leasing of tangible personal property, together with the services of an operator shall be subject to the tax when control of the property is exercised by the lessee. Control is exercised when the lessee has exclusive use of the property, and the lessee has the right to direct the manner of the use of the property. If these conditions are present, control is deemed to be exercised even though it is not actually exercised." 45 IAC 2.2-4-27(d)(3)(A).

IC 6-8.1-5-1(b) provides the presumption which taxpayer must overcome. That section states that, "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC 6-8.1-5-1(b). Taxpayer has failed to meet that statutory burden because it failed to provide factual information sufficient to establish that the five crane rental transactions fell within the sales tax exemption provided within 45 IAC 2.2-4-27(d)(3)(B). Taxpayer's bare assertion that it exercises no control over the crane and its operator is insufficient to bring itself within the exemption. 45 IAC 2.2-4-27(d) states that, "The rental or leasing of tangible personal property, by whatever means effected and irrespective of the terms employed by the parties to describe such transaction, is taxable."

Given the scale and complexity of the construction, engineering, and fabrication projects undertaken by the taxpayer – and absent specific information to the contrary – it would

be difficult to envision a circumstance under which taxpayer would rent a crane and then fail to retain “the right to direct the manner of the use of the [crane]” or fail to reserve for itself “the exclusive use of the [crane] . . .” 45 IAC 2.2-4-17(d)(3)(A).

FINDING

Taxpayer’s protest is respectfully denied.

IV. Imposition of the State Gross Retail Tax on an Invoice for Repair of Equipment.

Taxpayer hired vendor to repair the computer controls on an article of its machinery. The taxpayer argues that the invoice for this repair work represents the purchase of a service and is not subject to sales tax.

The vendor invoiced taxpayer for the provision of both services and materials. Vendor Invoice 500617, Oct. 8, 1996. The price of the vendor-provided materials – including keypad, software, memory modules, on/off assembly – is listed separately from the price of vendor’s services. The price of the materials is \$1,306.64 and the price of the vendor’s labor is \$600.00. The audit determined that the \$1,306.64 was subject to sales tax.

Under IC 6-2.5-2-1(a), the state imposes the state gross retail (sales) tax on retail transactions made in Indiana. Under IC 6-2.5-2-1(b), “[t]he person who acquires property in a retail transaction is liable for the tax on the transaction . . .” A retail transaction, the prerequisite to the imposition of the tax, is the transfer, in the ordinary course of business, of tangible personal property for consideration. IC 6-2.5-4-1(b). Therefore, absent the transfer of tangible personal property, the transfer of services alone is not subject to the state gross retail tax. 45 IAC 2.2-4-2(a) states that “[p]rofessional services, personal services, and services in respect to property not owned by the person rendering such services are not ‘transactions of a retail merchant constituting selling at retail,’ and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail . . .” Therefore, where the vendor transfers property together with services, the entire transaction is subject to the sales tax. However, an exception to that general rule is provided at 45 IAC 2.2-4-2(a)(2) which exempts “[t]he tangible personal property purchased [which] is used or consumed as a necessary incident to the service.” In addition, 45 IAC 2.2-4-2(c) states that “[p]ersons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts sold.”

Vendor sold taxpayer services and tangible personal property and – fortunately for taxpayer – listed the cost of each separately. As correctly determined by the audit, sales

tax is properly due on the taxpayer's purchase of tangible personal property and is not due on taxpayer's purchase of services.

FINDING

Taxpayer's protest is respectfully denied.

V. Request for Abatement of the Ten-Percent Negligence Penalty.

Taxpayer has requested that the ten-percent negligence penalty, imposed under authority of IC 6-8.1-10-2.1(a), be abated with respect to additional taxes assessed during the years encompassed with the audit period. Taxpayer argues that it was not careless in its duty to collect and remit the state sales and use tax but used ordinary business care and prudence in determining its state tax liability. Taxpayer further states that it has timely paid its tax liability and was not negligent in complying with the state tax code and regulations.

IC 6-8.1-10-2.1(d) states that if a person, subject to the negligence penalty, imposed under IC 6-8.1-10-2.1(a) can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the Department, was due to reasonable cause and not due to willful neglect, the Department shall waive the penalty. 45 IAC 15-11-2(b) defines "negligence" as the failure to use reasonable care, caution or diligence as would be expected of an ordinary reasonable taxpayer. Negligence results from a taxpayer's carelessness, thoughtlessness, disregard, or inattention to duties placed upon the taxpayer by the Indiana Code or Department regulations. Id.

In order to waive the negligence penalty, the taxpayer must prove that its failure to pay the full amount of tax due was due to "reasonable cause." 45 IAC 15-11-2(c). Taxpayer may establish reasonable cause by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed" Id. In determining whether reasonable cause exists, the Department may consider the nature of the tax involved, previous judicial precedents, previous Department instructions, and previous audits. Id.

Taxpayer has provided no substantive, statutory, or factual basis upon which the Department can justifiably be expected to find a reasonable cause for taxpayer's failure to pay sales and use taxes.

FINDING

Taxpayer's protest is respectfully denied.